

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE ROBBINSDALE ECONOMIC DEVELOPMENT AUTHORITY

In the Matter of the Application for
Relocation Benefits by James Brothers
Furniture, Inc.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge, George A. Beck, serving as a hearing officer for the Robbinsdale Economic Development Authority, at 9:00 a.m. on September 25, 2002 at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, in Minneapolis, Minnesota. The Claimant, James Brothers Furniture, Inc. ("James Brothers" or "Claimant"), filed a post-hearing memorandum on October 4, 2002. The Respondent, Robbinsdale Economic Development Authority ("REDA"), filed its post-hearing memorandum on October 11, 2002. There were no further submissions.

Kirk A. Schnitker, Esq., and Jon W. Morpew, Esq. of the firm of Schnitker & Associates, P.A., 2300 Central Avenue NE, Minneapolis, MN 55418, appeared on behalf of the Claimant, James Brothers. Robert J.V. Vose, Esq. of the firm of Kennedy & Graven, 470 Pillsbury Center, 200 S. 6th Street, Minneapolis, MN 55402 appeared representing the Respondent, REDA.

This Order is the final administrative decision.^[1] Judicial review of this decision may be had by certiorari to the Minnesota Court of Appeals.^[2]

STATEMENT OF ISSUE

The issues in this case are:

- (1) Whether the Claimant incurred extraordinary advertising or administrative costs in the liquidation of its inventory, that is, costs associated with the selling of its inventory on short notice, rather than in the ordinary course of business?
- (2) Should the Claimant be awarded the fixed payment in lieu of actual expenses?

The Administrative Law Judge concludes that James Brothers Furniture, Inc. incurred and should be compensated for extraordinary expenses associated with the

liquidation of its inventory in the amount of \$35,984.96. It is also concluded that the Claimant has waived its election to receive a fixed payment.

Based upon all of the proceedings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. James Brothers Furniture was owned and operated by James Senden at 4180 West Broadway in Robbinsdale, Minnesota for approximately ten years.

2. On May 15, 1999, REDA gave notice to James Brothers to vacate its premises within 90 days. At that point, James Brothers was renting from REDA under a month-to-month lease that required 90 days notice to terminate. REDA purchased the property rented by James Brothers in 1993, after contemplating its condemnation, to permit redevelopment of the area in conjunction with the construction of a new McDonald's restaurant. REDA did not offer any relocation assistance advisory services to the Claimant.^[3]

3. After he received the notice, Mr. Senden explored relocating his business, but decided that the cost of tenant improvements at the locations he looked at were too high and that he could not accomplish the move before he had to vacate. He then decided to liquidate his inventory by selling it at his existing location. Mr. Senden called several inventory brokers but found only one that was able to conduct a liquidation sale within the short three months timeline.^[4]

4. James Brothers entered into an agreement with Monk Enterprises on June 4, 1999, which called for Monk Enterprises to commence an inventory liquidation sale at the James Brothers premises beginning on June 16, 1999 and ending 120 days later.^[5] The agreement called for Monk Enterprises and James Brothers to each receive 50% of the net profits from the sale; however, James Brothers was guaranteed an amount equal to at least 6% of the gross sales as its share of the net profits.^[6]

5. The agreement also called for James Brothers to sell its inventory to Monk Enterprises for \$150,000.00 on the first day of the sale. However, Monk did not pay James Brothers this amount. Rather James Brothers contributed its inventory to the liquidation sale account. The sale of inventory to Monk was not actually done because the City of Robbinsdale required James Brothers (but not Monk) to secure a license for a going out of business sale.^[7]

6. There were four sources of inventory for this sale. James Brothers had inventory in its store; James Brothers ordered furniture before the sale, which was delivered during the sale; Monk Enterprises contributed furniture from its warehouse and Monk also contributed furniture from suppliers. Additional furniture was added to attract sufficient traffic to the sale. Monk and James Brothers did not keep an exact accounting of the sources of the inventory since it was not necessary to effect the 50-50 split in profits.

7. After the sale began, Mr. Senden became aware that he needed a license from the City of Robbinsdale for a going out of business sale. He applied for the license and it was approved by the City on July 6, 1999.^[8] The license was later extended through October 9, 1999.^[9]

8. In connection with the application for the license, James Brothers prepared an inventory of the furniture in its showroom as of July 6, 1999. The cost of the James Brothers inventory was calculated as \$191,820.00.^[10] James Brothers had already sold some of its inventory at this point. However, it submitted this inventory to REDA as the best evidence available of what it proposed to sell.

9. During the liquidation sale, Monk Enterprises provided the sales personnel. Extra office help was hired to handle credit cards and credit applications, work that was normally done by the salespeople. Advertising expenses were significantly higher than normal in order to attract sufficient traffic. Additional help was also hired in the warehouse to accommodate the higher volume of sales. And a sales commission was paid for sales supervisors that was not a normal expense.

10. Mr. Senden and his son were present at the sale and handled the bookkeeping. A liquidation sale account was established from which expenses of the sale were paid.

11. James Brothers vacated the store on October 24, 1999, approximately five months after receiving notice. It had received a short extension of its notice to vacate from the proposed new tenant in order to complete the sale.

12. The accounting for the sale shows net sales of \$802,456.37, with a cost of goods of \$485,433.90, resulting in a gross profit of \$317,022.47. Expenses amounted to \$221,420.82, which resulted in a net profit of \$95,601.65. This constituted a rate of return of 11.9%.^[11]

13. James Brothers received \$48,147.00 as its share of net profits from the sale under its agreement with Monk Enterprises. This figure was 6% of gross or net sales.

14. Sometime in November of 1999, after the sale was done, Mr. Senden learned from a real estate agent that he might have a claim for relocation benefits and he submitted a claim to REDA. REDA denied the claim on the grounds that James Brothers was not a "displaced person" within the meaning of state law.^[12] A hearing officer and the Minnesota Court of Appeals determined that the Claimant was eligible for benefits and awarded James Brothers \$12,433.00, less unpaid rent.^[13] That award has been paid to the Claimant by REDA.^[14] The Court also remanded the case for a determination of whether other benefits were due to the Claimant.

15. The total expenses for the sale, including a "sales management fee," amounted to \$268,875.09 broken down as follows:

Sales commissions for salespersons	\$39,954.71
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Sales commissions for sales supervisors	8,024.56
Office help	8,633.00
Warehouse help	35,198.50
Advertising	67,809.06
Rent	17,065.22
Utilities	6,662.71
Credit card expenses	13,627.44
Sales management fee	47,454.27
Paid out	2,053.26
Miscellaneous	<u>22,392.36</u>
Total	\$268,875.09 ^[15]

16. Miscellaneous expenses included items such as motels and travel expenses for additional workers and additional trucks. The “paid out” category represents cash payments to temporary workers that were not normally an expense of a sale.

17. The sales expenses incurred by James Brothers, for sales commissions for salespersons, rent, utilities, and credit card expenses were the same as its normal business expenses and should not be included as extraordinary expenses attributable to the liquidation sale.

18. While James Brothers would normally have some expenses for warehouse help and advertising, the amounts incurred in these categories during the sale were much higher. It is reasonable to adjust the expenses in these categories to deduct what would be a “normal” business expense and therefore arrive at the portion that is “extraordinary.”

19. The Claimant calculates its comparable “normal” expenses for warehouse help by averaging its warehouse help costs for 1997 and 1998, which amounted to a cost of \$37.82 per day. When applied to the 123 days of the sale, this results in a “normal daily cost” for the sale days of \$4,651.86.^[16]

20. The Claimant calculates its “normal” operating expenses for advertising costs in a similar fashion, which results in a yearly expense of \$24.54 per day or a “normal” expense of \$3,081.42 for the 123 days of the sale.^[17]

21. After deducting the normal operating expenses from the sale expenses the Claimant’s adjusted extraordinary expense for warehouse help for the sale is \$30,546.64 and the Claimant’s adjusted extraordinary expense for advertising is \$64,727.64.

22. In addition to the direct costs of the sale, James Brothers claims that it paid Monk Enterprises a “sales management fee” of \$47,454.27. This amount was the net profit from the sale less 6% of the net sales.^[18] The agreement described this amount as Monk’s share of the profit rather than a sales management fee. The “sales management fee” is not a reasonable cost or expense of the sale for James Brothers.

23. When the adjusted amounts for warehouse help and advertising are added to the sales expenses unique to the sale, namely, sales commissions for sales supervisors, office help, the paid out category and miscellaneous (but not the “sales management fee”) the total extraordinary expenses are \$136,377.19.^[19]

24. If James Brothers’ share of the costs is calculated at 50%, to track the division of profits, its extraordinary expenses become \$68,188.60. If James Brothers’ share of expenses is based upon its 39.5% share of the total inventory, as reflected in its July 6, 1999 inventory account, its share of extraordinary expenses would be \$53,868.99.

25. Net sales for the sale amounted to \$802,456.37. However, normal net sales for James Brothers were approximately \$425,145.00 per year. If the normal operating expenses for advertising costs and warehouse help costs incurred in the years 1997 and 1998 are further adjusted by comparing the net sales in those years to the net sales during the liquidation sale, the extraordinary expense for warehouse help would be reduced to \$16,098.00 and the extraordinary expense for advertising would be reduced to \$33,900.00.^[20]

26. The adjusted total extraordinary expenses of the sale are as follows:

Sales commissions for supervisors	\$ 8,024.56
Office help	8,633.00
Warehouse help	16,098.50
Advertising	33,900.00
Paid out	2,053.26
Miscellaneous	<u>22,392.36</u>
TOTAL:	\$91,101.18

27. The total extraordinary expenses amount to \$91,101.18. If the Claimant’s share of expenses is calculated at 39.5%, the Claimant would be due the sum of \$35,984.96.

28. The Claimant is entitled to either a fixed payment or actual extraordinary expenses, but not both. If the Claimant is entitled to a fixed payment in lieu of payments for actual expenses, it is entitled to the full payment of \$20,000.^[21]

29. James Brother’s first raised the issue of a payment in lieu of actual expenses in a letter dated December 21, 2000, after it had pursued an actual expenses claim and REDA had retained a consultant to recommend a payment.^[22] On January 19, 2000 the Claimant stated it would accept a \$20,000 payment to settle the relocation claim but would not waive any other claims for civil damages.^[23] James Brother’s then pursued its actual expenses claim and advised the prior hearing officer that it was electing “to go the actual cost route” since its costs exceeded \$20,000.^[24]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction to hear this matter.^[25] The Claimant received timely and appropriate notice of the hearing.

2. Federal law provides that a business which qualifies as a displaced person is entitled to payment for actual reasonable moving and related expenses, including the reasonable cost incurred in attempting to sell an item that is not to be relocated.^[26]

3. Minnesota has incorporated the federal law in state statute.^[27]

4. That the Claimant is entitled to recover any reasonable extraordinary business expenses incurred in liquidating its inventory on short notice.^[28]

5. The Claimant has the burden of proof to establish entitlement to benefits.

6. That REDA's determination of Claimant's benefits is not entitled to a presumption of correctness.

7. That the Claimant incurred and is entitled to recover the extraordinary expenses of its liquidation sale in the amount of \$35,984.86.

8. The purpose of the relocation assistance program is, in part, to insure that persons displaced as a direct result of federally assisted projects are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.^[29]

9. That the Claimant has waived its option to choose a fixed payment in lieu of expenses^[30] at this point by pursuing its claim for actual costs and accepting a payment for costs.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED: That the Robbinsdale Economic Development Authority shall forthwith pay relocation benefits for extraordinary sales expenses to James Brothers Furniture, Inc. in the amount of \$35,984.96.

Dated this 22nd day of October 2002.

S/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

Reported: Taped: Three tapes, no transcript prepared.

MEMORANDUM

This case was remanded to REDA and the hearing officer by the Minnesota Court of Appeals to determine whether the Claimant is entitled to reimbursement for any extraordinary costs incurred in its inventory liquidation sale. Specifically, the Court of Appeals indicated that “the hearing officer’s inquiry should focus on those reasonable costs associated with selling relator’s inventory on short notice; for example, any extraordinary business expenses relator incurred by liquidating its inventory at the inventory liquidation sale, above and beyond those expenses relator would have incurred by selling its remaining inventory in the ordinary course of business.”^[31] The Court also directed the hearing office to make findings or conclusions about whether the Claimant was entitled to a payment in lieu of its actual cost claim.

The parties disagree on the appropriate burden of proof in this case. The general rule in administrative cases is that an applicant for benefits has the burden of proof.^[32] The Claimant asks however that the evidence provided in this case be viewed in the light most favorable to James Brothers Furniture. In its post-hearing brief, REDA argues that this is an improper view and that James Brothers must prove the facts at issue by a preponderance of the evidence under OAH rules.^[33] REDA then goes on to suggest that the hearing officer is conducting the first *appellate* review of REDA’s relocation decision in this matter. It argues that the hearing officer should apply an arbitrary and capricious standard of review since REDA’s determination enjoys a presumption of correctness. However, the appellate review of this proceeding belongs in the Minnesota Court of Appeals. The Claimant must prove the facts at issue by a preponderance of the evidence. The agency is not entitled to a presumption of correctness as to its initial determination since this is a *de novo* evidentiary proceeding and not an appellate review.

At the hearing the Claimant presented evidence of the expenses it incurred in the liquidation sale (Finding of Fact No. 15). It claims total expenses of \$268,875.09 to conduct the sale and suggests that if the sale were made in the normal course of business it would have incurred only \$85,443.23 in costs. This results in extraordinary costs of \$183,431.86. The Claimant then presents two methods of calculating its share of the extraordinary expenses as distinguished from those incurred by Monk Enterprises. It suggests that it would be reasonable to split the costs 50/50 to reflect the split in profits. It also presented calculations dividing the extraordinary expenses by attributing 39.5% to James Brothers since this reflects the documented cost of inventory supplied by James Brothers to the sale. It suggests that the actual cost of inventory contributed by James Brothers was not calculated and cannot now be ascertained. The 39.5% calculation is the most reliable inventory figure available. It is adopted in this decision as against the 50% share of profits calculation because, it makes sense to base reimbursement of costs upon inventory contributed and because the admittedly imperfect nature of the calculations suggests use of the more conservative figure.

REDA presents several arguments in opposition to the James Brothers claim for benefits. It first argues that the Claimant did not actually directly incur any costs. The record indicates that the liquidation sale expenses were paid out of a sales account established for the liquidation sale. There is no evidence that James Brothers directly wrote checks to cover expenses. REDA suggests that the Court of Appeals' decision prohibits "attributing" expenses to the Claimant. However, the Court's decision clearly assumes that James Brothers may have had some extraordinary expenses incurred in the sale under its business arrangement with Monk Enterprises. The fact that the expenses were paid from a sales account on behalf of James Brothers rather than directly by James Brothers does not mean that it did not incur costs.

REDA also asserts that James Brothers' sales expense claim must fail because it violates the prohibition in federal regulations against the recovery of lost profits.^[34] Its argument is that James Brothers' profits from the sale will be in effect augmented if REDA is required to reimburse the sales expenses it claims. It argues that profit is normally defined as excess of revenues over expenditures and that although denominated as a claim for expenses, this is in fact a claim for additional profit. REDA's argument fails for two reasons. First, the direction from the Court of Appeals to the hearing officer is to determine what if any extraordinary costs associated with the selling of the inventory on short notice were incurred. The court's direction assumes that some expenses may be recoverable. Second, the court has not suggested that all operating costs for the sale would be recoverable. Rather, it held that "extraordinary" expenses, namely those that would not have been incurred in the ordinary course of business may be recoverable. An extraordinary expense would not have been incurred except for the forced liquidation of the James Brothers inventory.

REDA also argues that the regulation relied upon by the Court of Appeals in determining that costs of the sale of an item not to be relocated might be reimbursable in fact applies only to items that are not readily relocated such as permanent fixtures or immovable items. It suggests that sales costs are reimbursable only to the extent that the displaced party attempted to sell the item as a result of the displacement and was unable to do so. It argues that the displacement did not force James Brothers to sell its inventory rather than move it. Although this may be one possible interpretation of the federal regulation, it does not appear to be that adopted by the Court of Appeals. Its decision determined that items other than things such as heavy machinery could be sold and extraordinary expenses recovered. The evidence in this record does support a conclusion that Mr. Senden did pursue the possibility of relocation, but lacking relocation assistance or benefits, was unable to find another place of business within the timeline set out by REDA.

REDA suggests that the expense data submitted by James Brothers is unreliable. It states that it advised the Claimant that the exhibits it received one week prior to the hearing needed to be further documented. However, REDA apparently did not specifically request the documentation it believed was needed. The accounting records of the sale were received as business records. There is no reason to believe that they are inaccurate and the agency did not establish reason to suspect their accuracy at the hearing.

REDA does specifically object to conclusion of a “sales management fee” of \$47,455.00 as an expense. It points out that the agreement between Monk Enterprises and James Brothers makes no mention of such a fee and that this is merely a new label for Monk’s share of the net profits. The Claimant has not sustained its burden of proof to show that this “fee” is a legitimate extraordinary expense of the sale to James Brothers. It is more properly characterized as Monk’s share of net profits attributable to its contribution to the inventory for the sale.

The agency also asserts that the Claimant’s calculation of its expenses for commissions, office help, warehouse staff and miscellaneous expenses are flawed for various reasons. The Claimant does acknowledge that a perfect accounting of the revenue and expenses of the sale is not possible at this point. However, the Claimant supported the data with explanatory testimony at the hearing. Additionally, the Claimant points out that the data would be more detailed if James Brothers had been aware of the possibility of a claim for benefits prior to the sale.

During the hearing, the question arose as to whether or not the Claimant’s calculation of normal operating expenses for warehouse help and advertising need to be adjusted to compare the difference between the sales incurred during the normal business year and those during the liquidation sale. In its post hearing submission REDA suggested that the expenses could only be deemed “extraordinary” to the extent that they are not simply the result of the high volume liquidation sale. The average net sales during 1997 and 1998 in the normal course of business for James Brothers amounted to approximately 52.7% of the net sales during the 1999 liquidation sale. It is appropriate to further adjust the normal operating expenses for advertising costs and warehouse help to reflect the higher net sales made during the liquidation sale as compared to the normal business year.^[35] This adjustment brings the total extraordinary expenses of the liquidation sale to \$91,101.18 and Claimant’s share to \$35,984.96.

The federal statute and regulation provide that a displaced business may be eligible to choose a fixed payment in lieu of the payments for actual moving expenses.^[36] The agency and the Claimant have stipulated that the Claimant would have been eligible for such a payment at some point in the proceeding and that the amount of the payment would be \$20,000 based upon James Brothers’ average annual net earnings. The parties disagree, however, as to whether the Claimant continues to be eligible for such a payment. James Brothers first raised the in lieu claim by letter dated December 21, 2000, approximately one year after it initiated a claim for actual expenses. It argues that it continues to be eligible for the in lieu fixed payment award if its actual costs are adjudicated to be less than \$20,000. It suggests that while a payment in lieu and actual cost claims are mutually exclusive remedies, the law does not require displaced businesses to select one option or the other at the onset of the claim process. It suggests that if REDA’s argument is accepted a displaced business would always have to take the guaranteed payment rather than risking taking less benefits under an actual cost claim. James Brothers argues that it is at a minimum entitled to a \$20,000 payment (less the amount previously ordered by the Court of Appeals) in this proceeding.

It is clear that a business seeking relocation benefits must either elect between an actual moving expense payment or an in lieu payment.^[37] REDA argues that James Brothers' interpretation would permit it to pursue its actual cost claim with \$20,000 as a fallback. As REDA points out, this interpretation raises the question of what the fixed payment would be in lieu of. If the federal statute and regulations had intended a fixed payment to be the minimum amount covered by a displaced business it would have so stated. The reasonable interpretation of the statute and regulation is that a business may accept a fixed payment as an alternative to pursuing an actual cost claim but it was not intended that both could be pursued simultaneously. The law is not clear at what point the Claimant must make the election, however, in this case James Brothers has already accepted a payment of expenses in what it hopes is partial payment of its actual cost claim. Based upon this record it has made its election, and is no longer eligible for an in lieu fixed payment.

Finally, a comment is warranted concerning the nature of the Claimant's argument in this proceeding. The Court of Appeals advised James Brothers that its claims that REDA was acting in bad faith were unsupported by the record and bordered on the absurd.^[38] In its post hearing brief James Brothers states that REDA's treatment of James Brothers has been "vindictive and illegal," and that REDA has engaged in "illegal conduct" throughout this matter. Counsel should review the professionalism aspirations at III.A.5. which states: "We will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations or acrimony towards opposing counsel parties and witnesses."

G.A.B.

^[1] *In re Application for Relocation Benefits of James Brothers Furniture, Inc.*, 642 N.W. 2d 91, 97 (Minn. App. 2002).

^[2] *Id.*

^[3] See, 42 USC § 4625; Minn. Stat. § 117.52, Subd. 1. Services may include information on comparable replacement locations, a reasonable opportunity to relocate, assistance in relocating, and information on available federal and state programs.

^[4] Exhibit A, pp. 32, 51

^[5] Exhibit 10, Exhibit B

^[6] Exhibit 10, Page 2

^[7] Exhibit A, p. 101

^[8] Exhibit 8

^[9] Exhibit 9

^[10] Exhibit 21

^[11] Exhibit 11

^[12] Minn. Stat. § 117.50, Subd. 3

^[13] *James Brothers, supra*

^[14] Ex EE

^[15] Exhibit 13

^[16] Exhibit 18; See also Exhibit 19, 20

^[17] Exhibit 15

- [\[18\]](#) Exhibit 10, p. 2, Exhibit Z, p. 5
- [\[19\]](#) Exhibit 13, Exhibit 14
- [\[20\]](#) Exhibit 24
- [\[21\]](#) Stipulation of the Parties
- [\[22\]](#) Exhibit 1.
- [\[23\]](#) Exhibit 6.
- [\[24\]](#) Exhibit 2, p. 14.
- [\[25\]](#) 49 CFR § 24.10; *James Brothers, supra*, 642 N.W.2d at 103 – 104. Minn. Stat. § 117.52;
- [\[26\]](#) 42 USC § 4622; 49 CFR § 24.303(a)(11)
- [\[27\]](#) Minn. Stat. § 117.52, Subd. 1
- [\[28\]](#) *James Brothers, supra*, 642 N.W.2d at 102
- [\[29\]](#) 49 CFR § 24.1(b)
- [\[30\]](#) See 42 USC § 4622(c).
- [\[31\]](#) *James Brothers, supra*, 642 N.W. 2d at 102.
- [\[32\]](#) *In re City of White Bear Lake*, 311 Minn. 146, 247 N.W. 2d 901, 904 (1976).
- [\[33\]](#) Minn. Rules 1400.7300, subp. 5.
- [\[34\]](#) 49 CFR § 24.305.
- [\[35\]](#) See Finding of Fact No. 25.
- [\[36\]](#) 49 CFR § 24.306.
- [\[37\]](#) *Lickteig v. Iowa Department of Transportation*, 356 N.W. 2d 205, 209-10 (Iowa 1984).
- [\[38\]](#) *James Brothers, supra*, 642 N.W. 2d at 104.